90-849

(1)

No. 90—

IN THE

Supreme Court of The United States

OCTOBER TERM, 1990

COUNTY OF LOS ANGELES, *et al.*,

Petitioners,

v.

YOLANDA GARZA, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DE WITT W. CLINTON
COUNTY COUNSEL OF
LOS ANGELES
MARY WAWRO
SENIOR ASSISTANT
COUNTY COUNSEL
648 Hall of Administration
500 W. Temple Street
Los Angeles, CA 90012
Telephone: (213) 974-1811

RICHARD K. SIMON
LEE L. BLACKMAN
ERICH R. LUSCHEI
McDERMOTT, WILL & EMERY
2029 Century Park East,
Suite 3800
Los Angeles, CA 90067-2917
Telephone: (213) 277-4110

Counsel for Petitioners
COUNTY OF LOS ANGELES, *et al.*

JOHN E. McDERMOTT
660 S. Figueroa Street, Suite 2300
Los Angeles, CA 90017
Telephone: (213) 955-4600

Counsel of Record for Petitioners

JOHN E. McDERMOTT
RICHARD C. FIELD
EVAN M. EISLAND
Cadwalader Wickersham & Taft
660 S. Figueroa Street, Suite 2300
Los Angeles, CA 90017
Telephone: (213) 955-4600

GLEN D. NAGER
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005-2088
Telephone: (202) 879-3939

November 30, 1990

Questions Presented

1. Whether the one-person, one-vote, equal protection rule of *Reynolds v. Sims* requires single member districts to be equal in population or equal in citizens (or eligible voters)?

2. Whether *Reynolds* obligates a reapportioning body drawing districts that are equal in population to minimize variations in citizens and voters among the districts?

3. Whether a district court properly may infer invidious intent from the adoption of a redistricting plan containing no material change in boundaries, where the district court expressly found no racial animus, where a minority group has disavowed interest in a concentrated minority district and where the reapportioning body failed to take affirmative action to create a minority concentrated district because of a partisan political stalemate?

4. Whether a remedial redistricting plan that places the remedial district in a district other than that which was the basis for the liability finding and which is not specifically tailored to curing the discriminatory effects of prior redistricting exceeds the remedial power of the district court?

5. Whether the "*Thornburg* effects" are the effects that must be proven in a vote dilution case alleging intentional discrimination?

6. Whether a district court exceeds its remedial power by imposing a *Thornburg* majority district remedy without first requiring proof of the "*Thornburg* effects"?

7. Whether the decennial redistricting rule established in *Reynolds v. Sims* should foreclose a postcensal challenge to a redistricting plan valid under Section 2 of the Voting Rights Act at the time it was adopted?

Rule 14.1(b) List of Parties

The petitioners (defendants-appellants in the proceedings below) are County of Los Angeles; Los Angeles County Board of Supervisors; Deane Dana, Peter F. Schabarum, and Michael D. Antonovich, County Supervisors; Richard B. Dixon, County Administrative Officer; and Frank F. Zolin, County Clerk/Executive Officer.

The respondents (plaintiffs-appellees in the proceedings below) are Yolanda Garza, Salvador H. Ledezma, Raymond Palacios, Monica Tovar and Guadalupe De La Garza, individually and on behalf of all Hispanic registered voters in Los Angeles County; and United States of America. The respondents (intervenors-appellees in the proceedings below) are Lawrence K. Irvin, Rev. James M. Lawson, Jr., John T. McDonald, Jr., Ernestine Peters, Los Angeles Branch NAACP (National Association for the Advancement of Colored People), Southern Christian Leadership Conference of Greater Los Angeles, and The Los Angeles Urban League, individually and on behalf of all Black registered voters in Los Angeles County; and Sarah Flores. The respondents (defendants in the District Court and filed a Brief in Support of Plaintiffs-Appellees in the Court of Appeals) are Kenneth Hahn and Edmund D. Edelman, County Supervisors.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of The United States

OCTOBER TERM, 1990

COUNTY OF LOS ANGELES, *et al.*,

Petitioners,

v.

YOLANDA GARZA, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners County of Los Angeles and three members of the Los Angeles County Board of Supervisors (collectively the "County") respectfully pray that a writ of certiorari issue to review the judgment and mandate of the United States Court of Appeals for the Ninth Circuit (the "Court of Appeals") entered in this proceeding on November 2, 1990.

Opinions Below

The Order of the United States District Court, Central District of California (David V. Kenyon, District Judge), denying the County's motion for summary judgment is unreported and appears in the Appendix at A-230. The Findings of Fact and Conclusions of Law ("Findings") of the District Court is unreported and appears in the Appendix at A-50. The Order of the District Court that sets forth the Remedial Plan is unreported and appears in the Appendix at A-152. The Order of the Court

of Appeals motions panel (Nelson, Beezer, and Kozinski, Circuit Judges), temporarily granting a stay of the District Court's initial injunction order pending oral argument on the County's stay application and granting a motion for expedited scheduling of the appeal is unreported and appears in the Appendix at A-220. The Order of the Court of Appeals motions panel staying the District Court's initial injunction order pending a decision by the Court of Appeals on the merits is unreported and appears in the Appendix at A-164. The Order of the Court of Appeals merits panel (Schroeder, Nelson and Kozinski, Circuit Judges) denying the County's request for judicial notice is unreported and appears in the Appendix at A-194. The opinion of the Court of Appeals (Schroeder, Nelson and Kozinski, Circuit Judges; Kozinski, Circuit Judge, concurring and dissenting in part) is reported at 1990 U.S. App. LEXIS 19470 and appears in the Appendix at A-1. The Order of the Court of Appeals denying the County's petition to recall the mandate is unreported and appears in the Appendix at A-49.[1]

Jurisdiction

The judgment and mandate of the Court of Appeals was entered on November 2, 1990. This petition for certiorari is filed within 90 days of that date. Jurisdiction is invoked under 28 U.S.C. §1254(1).

Constitutional Provisions And Statutes Involved[2]

The constitutional provisions and statutes involved in this case include:

i. U.S. Const. amend. XIV, §1.

ii. U.S. Const. amend. XV, §1.

iii. 42 U.S.C. §1973 (1965) as amended by Act of June 29, 1982, Pub. L. 97-205 §3, 96 Stat. 134 ("Section 2 of the Voting Rights Act" or "Section 2").

---

[1] Concurrently with the filing of this petition, the County has submitted an application for a recall of the mandate of the Court of Appeals and for a stay thereof pending a decision on this petition.

[2] Pursuant to Supreme Court Rule 14.1(f), the pertinent text of the provisions cited in this section are set forth in the Appendix at A-358 to A-360.

iv. California Election Code §35000 (West 1989).

v. California Election Code §35001 (West 1989).

vi. California Government Code §25005 (West 1988).

vii. Los Angeles County Charter Article II, §7.

Statement Of The Case

This petition arises from two cases challenging the legality of a redistricting plan adopted by the five-member Los Angeles County Board of Supervisors (the "Board") on September 24, 1981. On August 24, 1988, seven years after the 1981 redistricting plan was adopted, the Garza plaintiffs filed suit, alleging that the redistricting plan violated Section 2 of the Voting Rights Act because the district lines fragmented the Hispanic community, thereby diluting Hispanic voting strength. The Garza plaintiffs also alleged that the redistricting plan was adopted for a racially discriminatory purpose in violation of Section 2 and the Fourteenth and Fifteenth Amendments to the United States Constitution. (Appendix ("App.") A-58, Findings 9-11). On September 8, 1988, the United States filed a separate action which alleged that the redistricting plan violated Section 2. (App. A-58, Finding 9).

The Board subsequently moved to dismiss the actions on the grounds of laches and mootness. The Board argued that because the plaintiffs unreasonably delayed seven years in bringing suit, and that the Board would soon redistrict following the 1990 census, plaintiffs' claims should be dismissed. The Board also moved for summary judgment on plaintiffs' Section 2 claims on the basis that demographic evidence unequivocally showed that it was impossible in 1981 to create a district in which Hispanics would constitute a majority of eligible voters. Both motions were denied (App. A-230), and the parties proceeded to trial. On June 4, 1990, the day before the primary election for Supervisorial Districts 1 and 3, the District Court below found in favor of the plaintiffs on their Section 2 and constitutional claims. (App. A-53).

In the June 5 primary, incumbent Supervisor Edmund D. Edelman was reelected to District 3. (App. A-209). In the District 1 contest, ten candidates ran for the office. (App. A-226). Sarah Flores, an Hispanic candidate, was the frontrunner. She received 35% of the total vote, including 68% of the Hispanic vote and 31% of the nonHispanic vote. Gregory O'Brien polled second with 20% of the vote. (*Id.*). Therefore, Ms. Flores and Mr. O'Brien were scheduled to face each other in a runoff election on November 6, 1990 in the last election under the 1981 redistricting plan.

The remedial proceedings commenced before the district court on July 23, 1990. On August 1, 1990, the district court rejected the County's proposed remedial plan (See App. A-197) and on August 3, 1990, adopted a plan drawn by plaintiffs. (App. A-216).

On August 6, 1990, the district court entered a permanent injunction enjoining the November 6, 1990 runoff election for District 1, setting aside the results from the June 5 District 1 primary, and ordering the County to implement a special primary election in November under the plaintiffs' remedial plan. (App. A-152). On August 16, 1990, a split motions panel of the Ninth Circuit (Judge Beezer and Kozinski in favor, and Judge Nelson against) entered a stay of the special election pending resolution of the merits of the County's appeal. (App. A-164).

On November 2, 1990, a merits panel of the Ninth Circuit (Judges Schroeder, Nelson, and Kozinski) entered a decision which unanimously upheld the district court's determination on liability but was divided in upholding the propriety of the remedy adopted by the district court. (App. A-1). In a carefully reasoned dissent, Judge Kozinski demonstrated that the remedial plan of the district court violates the one-person, one-vote doctrine because, even though all five districts are equal in population, one district has two to three times more voters and citizens than another, thereby substantially overvaluing the votes of voters in one district while undervaluing the votes of voters in other

districts. The majority of the merits panel ordered the matter remanded to the district court and instructed the district court to schedule a new primary election at the earliest practical opportunity.

On November 8, 1990, the district court adopted a schedule under which candidate filing commenced on November 9, 1990, and a special primary election will be held on January 22, 1991. (App. A-165). On November 27, the County's Petition for Rehearing En Banc was deemed denied.

Reasons for Granting the Writ

This case raises some of the most significant voting rights issues since the Court's decision in *Thornburg v. Gingles*, 478 U.S. 30 (1986).

First, it raises an issue of enormous constitutional significance which a panel of the Ninth Circuit could not resolve unanimously, namely whether the one-person, one-vote rule of *Reynolds v. Sims*, 377 U.S. 533 (1964), requires districts to be equal in population or equal in citizens (or eligible voters). This momentous question is important to every political jurisdiction in the Southwest and elsewhere with large concentrations of noncitizens.

Second, the intentional discrimination determination not only conflicts with this Court's standard for proving intentional discrimination articulated in *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256 (1979), but the implications of that determination are that every redistricting motivated by partisan considerations or a desire to preserve incumbencies is invalid if it fails to maximize minority political influence or compensate for the effects of long past decisions.

Third, this case raises important questions about the scope of federal district court remedial powers in fashioning redistricting plans, questions which are especially timely in view of the imminent release of the 1990 census and the redistrictings and redistricting litigation that will follow. The district court's remedial plan bears no resemblance to its discriminatory purpose

findings which would compel a far different remedy. Remedy, in short, bears little relationship to liability.

Fourth, the Court of Appeals erred as a matter of law in not requiring proof of the *Thornburg* effects in a case alleging intentional discrimination and in imposing a drastic *Thornburg* majority district remedy without proof of the *Thornburg* effects, in lieu of a more modest remedy commensurate with the discriminatory purpose findings. The implications of that decision for vote dilution litigation are staggering because without *Thornburg's* effects test there is no way to measure vote dilution, or to determine whether it was caused by the electoral scheme under challenge or to draw a remedy bounded by the theory of liability.

Finally, if the Court of Appeals' decision affirmed the district court's determination that a Section 2 violation was proven on the basis of post-1980 demographic changes, then it raises the fundamental constitutional question whether the decennial redistricting rule established in *Reynolds v. Sims* should foreclose a challenge to a redistricting plan valid under Section 2 at the time it was adopted.

These issues are not settled in Voting Rights Act or equal protection jurisprudence.

I.

THE REMEDIAL PLAN IS INVALID ON TWO SEPARATE EQUAL PROTECTION ONE-PERSON, ONE-VOTE GROUNDS

A. The Remedial Plan Provides Voters in One District with the Equivalent of Twice as Many Votes as Voters in the County's Other Districts

The most compelling basis for reversing the decision of the Ninth Circuit is discussed in detail in Judge Kozinski's dissenting opinion. Essentially, he believed that the district court's remedial plan created unacceptable variations in citizens among supervisorial districts in violation of the one-person, one-vote principle announced by this Court in *Reynolds v. Sims*, 377 U.S.

533 (1964), to the point where the value of a vote cast in one district is over twice the value of a vote cast in another.

The panel majority did not view such variations in citizenship as constitutionally significant so long as the five districts in the remedial plan were equal in total population. Judge Kozinski found the constitutional problems of unequal voting power to be impermissible, whether or not population parity was achieved. He was of the view that equality of voting power is constitutionally primary.

Judge Kozinski carefully summarized the prior Supreme Court jurisprudence which supports the principle of *electoral equality* (creating five districts each equal in the number of citizens) in preference to the principle of *representational equality* (five districts each equal in total population) adopted by the panel majority. Surely, such a fundamental conflict of constitutional principles warrants Supreme Court review, particularly where as here an unprecedented factual situation of enormous political and social consequence has been presented that will affect imminent redistrictings in countless political jurisdictions in the Southwest with large concentrations of noncitizens.

The remedial plan contains five supervisorial districts that are nearly equal in population. Yet the district court's August 6 findings reveal that District 1 (the Hispanic District) has nearly 400,000 fewer voting age citizens than District 3, a variance of 40%. (App. A-154). Those findings also reveal that District 1 has only 366,145 registered voters, while District 5 has over two times that number, or 835,408 registered voters (App. A-155), a variance of 70%. (See Ex. 1520, App. A-336). As a result, the value of a vote in District 1 is worth over twice what a vote in District 5 is worth and District 1 will control one-fifth of the Board seats with but one-tenth of the voters in the County.

How is it possible to create districts equal in population but so unequal in citizens? By packing non-citizens into District 1. It is undisputed that if one uses either citizenship or voting age citizenship instead of total population as the apportionment base,

one cannot form a majority Hispanic voting age citizen district *in 1980 or 1990.* (Ex. 4151A, App. A-340). That is because only 42% of Los Angeles County's Latinos age 18 and older are citizens, compared to 97% of Blacks and 95% of Whites. Latinos were 27.6% of the County's population in 1980 but only 14% of its citizens. Hispanic total population therefore is not a good measure of the distribution of Hispanic voting age citizens. Hispanic voters and citizens, moreover are residentially dispersed throughout Los Angeles County in a nonrandom manner. Essentially, those who are citizens and eligible to vote do not live where most immigrant, noncitizen Hispanics live. For example, 67% of Spanish origin registered voters live in precincts which are less than 40% Spanish origin. (*Ex. 5540,* App. A-337). Hispanic *citizens*, in other words, are distributed quite differently from Hispanic persons.

The remedial plan, in effect, burdens the right to vote of citizens in other districts to benefit citizens in District 1, by concentrating people in District 1 who legally are not entitled to vote. This distributes political power on the basis of *the presence of noncitizens,* a criterion unrelated to and in fact at odds with the exercise of that franchise by the only people entitled to exercise that franchise—*citizens*. This is crucial to understand—plaintiffs are claiming a right to a district packed with Hispanic noncitizens who are not even covered by Section 2[3] to ensure an Hispanic voting age citizen majority that otherwise cannot be created *in 1980 or in 1990.*

Reynolds clearly commands rejection of such districts:

> And, if a State should provide that *the votes of citizens* in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted.

---

[3] Section 2 only protects "members of the electorate," i.e., *citizens.* Thus, while Section 2 authorizes packing of Hispanic *citizens* into a district, within the limits of the one-person, one-vote rule, it does not authorize the packing of *non-citizens.*

377 U.S. at 562, *see also* at 566-67 ("The basic principle of representative government remains, and must remain unchanged —the weight of a citizen's vote cannot be made to depend on where he lives."). And more recently in *Board of Estimate v. Morris,* the Court stated: "*The personal right to vote is a value in itself, and a citizen is,* without more and without mathematically calculating his power to determine the outcome of an election, *shortchanged if he may vote for only one representative when citizens in a neighboring district, of equal population, vote for two*; or to put it another way, if he may vote for one representative and the voters in another district half the size also elect one representative." U.S. , 109 S.Ct. 1433, 1440, (1989) (emphasis added).

The Supreme Court, moreover, has made clear that citizenship is a permissible apportionment base and that a state need not include aliens in the apportionment base.[5] In *Burns v. Richardson*, 384 U.S. 73 (1966), for example, the Court stated:

> Neither in *Reynolds v. Sims* nor in any other decision has this Court suggested that the States are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime, in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured.

384 U.S. at 92.[6] In *Burns*, while the Court made clear that states are not required to include "aliens," among others, in the apportionment base, it declined to rule that they must be

---

[5] *See WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964) (upholding New York's state constitution which apportioned on the basis of citizenship); *see also WMCA. Inc. v. Lomenzo*, 238 F. Supp. 916 (S.D.N.Y. 1965), expressly upholding citizenship as the apportionment base, *aff'd per curiam*, 382 U.S. 4 (1965) (Justice Harlan referred to lower court decision as "eminently correct"), *vacated as moot*, 384 U.S. 887 (1966) and discussion in *Burns*, 384 U.S. at 91 (such an apportionment "presented problems no different from apportionments using a total population measure"); *see also Winter v. Docking*, 373 F. Supp. 308 (D. Kan. 1974) (upholding Kansas agricultural census which excludes aliens).

[6] "While *Burns* does not, by its terms, purport to require that apportionments equalize the number of qualified electors in each district, the logic of the case

(Footnote continued on following page)

excluded, because that decision "involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere." 384 U.S. at 92. Immediately thereafter the Court stated that choices about the apportionment base are sometimes constrained by the Constitution, citing *Carrington v. Rash*, 380 U.S. 89 (1965) as an example. *Id.* The *Burns* Court did not address the question whether or when the *Reynolds* right itself, a *citizen's* right to undebased voting, might itself provide such a constitutional constraint on apportionment base choices, because that issue was not before the Court. This, of course, is the issue before the Court in this case.[7]

(Footnote continued from previous page)

strongly suggests that this must be so . . . . [I]n a situation such as ours—as that in *Burns*—one or the other of the principles must give way. If the ultimate objective were to serve the representational principle, that is to equalize populations, *Burns* would be inexplicable, as it approved deviations from strict population equality that were wildly in excess of what a strict application of that principle would permit." (footnote omitted) Kozinski, Dissenting Opinion (App. A-39).

[7] Judge Kozinski correctly noted in his dissenting opinion that "[w]hen considered against the Supreme Court's repeated pronouncements that the right being protected by the one-person, one-vote principle is personal and limited to citizens, [the majority's arguments] do not carry the day." (App. A-40). Indeed, the majority decision is deeply flawed and in fact implicitly rests on the invention of a new and heretofore unrecognized right, a right all people evidently hold to "equal representation."

This Court has long recognized that "the right to vote in state elections is nowhere expressly mentioned" in the Constitution, *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 665 (1966). Nor has the Supreme Court ever recognized any implied equal representation constitutional right. Indeed, such a right is inconsistent with the only voting right that the Supreme Court has implied, namely the "equal right to vote."

Supreme Court decisions virtually exclude the possibility of any such implied right. Noncitizens are strongly protected against discrimination because ever since *Graham v. Richardson*, 403 U.S. 365 (1971), state and local governments have been barred from discriminating against them in the distribution of economic benefits. Exactly the opposite is true, however, with regard to discriminations for the purpose of defining state or local political communities. For example, in holding that New York could bar noncitizens from employment as state police personnel the Court recognized that the states had an "historical power to exclude aliens from participation in its democratic political institutions, as part of the sovereign's obligation to preserve the basic concept

(Footnote continued on following page)

B. The Court of Appeals Majority Incorrectly Assumed that there Was No Way to Harmonize Representational Equality and Electoral Equality

Even using total population as the apportionment base, it is undisputed that plaintiffs could have created five districts equal in population but *without* such gross variances in citizens and registered voters. (RT 3/15/90 at 4-20, App. A-318). Of course, had they done so, Latinos would not be a majority of the voting age citizens in any district even today and they would not be able to meet *Thornburg's* geographic compactness condition. Use of harmonizing criteria, then, would have necessitated dismissal of plaintiffs' Section 2 claim and a far less drastic remedy for the intentional discrimination determination than the *Thornburg* majority district remedy imposed by the district court.

The County had attacked the district court remedial plan on two separate equal protection one-person, one-vote grounds:

> (i) That where total population is a poor predictor statistically of the distribution of citizens as in the present case, citizenship—not total population—is the constitutionally required apportionment base for one-person, one-vote purposes. This is the clash between electoral and representational equality discussed in section I. A, *supra*; and
>
> (ii) That the reapportioning body (here the district court) is constitutionally *obligated* at least to attempt to satisfy both aspects of the one-person, one-vote doctrine, *i.e.*, if utilizing districts equal in population, it must minimize variances in citizens and in voters to the extent possible.

(Footnote continued from previous page)

of a political community." *Foley v. Connelie*, 435 U.S. 291, 295-96 (1978). The Court reiterated this point in *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982), in upholding a California law requiring that "peace officers" be citizens, and in *Ambach v. Norwick*, 441 U.S. 68 (1979), in upholding a Connecticut law requiring that public school teachers be citizens. It is frankly unimaginable that the Supreme Court, having held that state and local governments can disenfranchise noncitizens and bar them from elective and many appointive offices, would find that noncitizens nonetheless have an implied constitutional right to equal representation.

The district court did not address this issue at all. *Neither did the Ninth Circuit majority opinion.* Judge Kozinski would have remanded to see if it is possible to reconcile both the interests of electoral and representational equality—to construct a remedy where districts are equal in population and with less variance among citizens. (App. A-46 to A-48).

The Ninth Circuit's opinion, therefore, appears to be based on a false assumption—that there is a conflict between the two interests when in fact there may not be. Thus, there is an alternative not considered by the panel majority which permits the Court to avoid the need to select which aspect of the one-person, one-vote doctrine is constitutionally preferred—the lower court should be instructed to comply with both. There is no reason why the lower court could not fashion a remedial plan in which each district contains at least roughly equal numbers of people and people eligible to vote. Only Judge Kozinski acknowledged this possibility. The majority nowhere discusses what its decision would be if it were not forced to choose between the two prongs of the one-person, one-vote standard.

II.

THE COURT OF APPEALS RULING THAT THE BOARD OF SUPERVISORS INTENTIONALLY DISCRIMINATED AGAINST HISPANICS CONFLICTS WITH DECISIONS OF THIS COURT AND RESTS ON IMPORTANT CONSTITUTIONAL AND STATUTORY QUESTIONS OF LAW WHICH HAVE NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT

The district court acknowledged that the Board did not act with any racial animus or hostility when it adopted the 1981 redistricting plan under challenge here. In fact, the Board tried to create a more Hispanic district in 1981 but could not do so because of a partisan political stalemate. Four votes were required to enact a plan and the Board was split 3-2 along Conservative-Liberal, Republican-Democratic lines. The Republicans wanted

to make District 3, which already was Democratic, more Hispanic. The Democrats tried to make the Republican districts more Hispanic and hence more Democratic because concentrating them in District 3 would not have changed the balance of power. When they could not agree on a plan, the Board simply reenacted the existing lines adopted in 1971, with minor changes.

The district court's conversion of this political stalemate into intentional discrimination, despite exonerating findings, was a clear error of law which resulted from the use of an erroneous definiton of invidious intent. The importance of, and uncertainty surrounding, the question of what the elements are of a racially discriminatory purpose, the application of those elements to a situation involving non-action and race-neutral partisan political objectives, and the proper relationship between a discriminatory purpose finding and the remedy ordered, warrant certiorari in this case.

A. The Courts Below Applied an Erroneous Definition of Invidious Intent to a Redistricting Plan Containing No Change in Boundaries Admittedly Adopted Without Racial Animus in Circumstances Where the Hispanic Community Disavowed Interest in a Concentrated Hispanic District

The district court determined that the Board intended to discriminate against Hispanics in the 1981 redistricting, not because of any desire on the part of the Board to harm Hispanics, but because the result of the Board's protection of incumbents and political philosophies was the Board's *failure* to take affirmative action to create a majority Hispanic district in total population: "It was not because of a desire on anyone's part to dilute or diffuse or to keep the Hispanic community powerless; it was because they could not find the way to do what everyone wanted to do. And that sometimes happens in politics." (App. A-55; see also App. A-83 to A-84, Findings 175-181).

The district court's finding that the Board discriminated against Hispanic interests, even though it had no desire to harm

those interests, evidences a misunderstanding of the constitutional definition of invidious intent set forth by the Court in *Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256 (1979), and *City of Mobile v. Bolden,* 446 U.S. 55 (1980). In those decisions, the Court rejected a definition of invidious intent "that a person intends the natural and foreseeable consequences of his voluntary actions," *Feeney* at 278, and held that:

> 'Discriminatory purpose,' however, implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decisionmaker . . . *selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.* . . .

442 U.S. at 278 (citations omitted) (emphasis added).

The district court's finding that the Board acted for a "discriminatory purpose" is not a finding of the sort that *Feeney* and *Mobile* require, because it is *not* a finding that fragmentation of the Hispanic Core or dilution of Hispanic voting strength was a desired consequence or goal of the 1981 redistricting. The court found that the Board in 1981 approached redistricting with exactly the opposite racial "objective" in mind, that is "to protect their incumbencies while increasing Hispanic voting strength." (App. A-54 to A-55).

The Hispanic community in 1981, moreover, opposed—indeed attacked—any proposal to focus the Hispanic population in a single district. (RT 1/3/90, at 67-73, App. A-271; RT 1/10/90, at 147-48, App. A-278; App. A-78, Finding 148). Instead, Hispanic leaders proposed a "non-negotiable plan" in which there would be one 50 percent Hispanic and one 42 percent Hispanic district in total population. (App. A-78, Finding 149; RT 1/4/90, at 193-94, App. A-281). The representatives of the Board responsible for proposing a plan, however, could not achieve consensus on any such plan. The plan proposed by the Hispanic community threatened to lower the Republican registration in the First Supervisorial District significantly (thus threatening the ouster of a "conservative" by a "liberal"). (RT

1/3/90, at 22-23, App. A-269; App. A-80 to A-81, Findings 157-58). The alternatives proposed by the representatives of the conservatives on the Board were unacceptable to other members of the Hispanic community (although they increased Hispanic registration in the Third District and had minor effects on the Hispanic percentage in the First District), and to the Board's liberal minority (which perceived the proposals as reducing their ability to influence the other members of the Board). (*Id.*; RT 1/8/90, at 124-32 App. A-284; App. A-76, A-79, A-81, Findings 138, 151, and 159). Because the County Charter required four votes out of five in order to amend the district lines, the political stalemate resulted in but minimal change: only what was needed to equalize population. (App. A-82, Finding 172).

This evidence led the district court to the fundamental, but unremarkable, finding that the preexisting "fragmentation"[8] of the Hispanic community under the status quo plan ultimately adopted in 1981 was not cured in 1981 because of a political stalemate. As the County argued, and the district court found, no change in the political boundaries could be agreed on because all of the ambitious redistricting plans threatened to change the political balance of power, not by electing an Hispanic or avoiding the election of an Hispanic, but by replacing an Anglo Republican with an Anglo Democrat or by diluting Republican or Democratic influence. (App. A-55).

The importance of the distinction adopted by the trial court between incumbency-protection that is tied to the quest to obtain or maintain partisan advantage and incumbency-protection which seeks to prevent the election of racial or ethnic minorities who have a partisan outlook in common with the Anglo

---

[8] With regard to the pre-1981 findings, neither the district court nor the appellate panel explained how they were relevant to the 1981 plan—the only districting at issue. What happened in these early years is obviously only the most tenuous evidence of the Board's purpose in 1981, since, among other matters, it was a different board. The pre-1981 findings might be relevant if their effects were perpetuated in the 1981 districting. The problem is that the district court made no finding that any of these early acts of discrimination exerted causal effects that significantly influenced events in 1981.

incumbents hardly can be overstated—the former is not illegitimate.[10]

Notwithstanding its clear determination that the district lines of 1971 could not be changed in 1981 because of a race-neutral political stalemate, the district court also adopted a legal conclusion that the inability to act, which was the consequence of such political considerations, could not justify the failure to cure the fragmentation of the Hispanic community which existed in 1981. (App. A-55). In its detailed Findings, the district court adopted a number of proposals of the plaintiffs which warp this finding of a political stalemate into some kind of intentional effort to disadvantage Hispanics. Some of the formulations are quite remarkable doublespeak: A political stalemate is not inaction, it is an intentional effort "to avoid the consequences of a redistricting plan designed to eliminate the fragmentation of the Hispanic population." (App. A-83, Finding 174.) (There is no finding, of course, that the consequences to be avoided were Hispanic empowerment or greater Hispanic influence.) Recognition that the status quo was the only option became an "awareness" and thus an "intention" to continue the fragmentation of the Hispanic Core and the dilution of Hispanic voting strength. (App. A-84, Finding 181.) (There is, of course, no finding of a desire to continue Hispanic fragmentation or to adversely impact Hispanic political participation. Indeed, the evidence confirmed that the major participants in 1981 *all* sought to create an Hispanic district but could not find a consensus which accomplished that objective. (App. A-76, A-79, Findings 133, 151, 152 and App. A-54 to A-55)

Feeney and *Mobile* require reversal here because the district court expressly found that racial animosity played no part in the adoption of the 1981 plan: " 'It was not because of a desire on anyone's part to dilute or diffuse or to keep the Hispanic

[10] *See Wyche v. Madison Parish Police Jury*, 769 F.2d 265, 268 (5th Cir. 1985); *McMillan v. Escambia County*, 638 F.2d 1239, 1245 (5th Cir.), *cert dism'd sub nom., Pensacola v. Jenkins*, 453 U.S. 946 (1981), *vacated in part*, 688 F.2d 960 (5th Cir. 1982); *see also White v. Weiser*, 412 U.S. 783 (1973).

community powerless.' " (App. A-55). This was a struggle between political ideologies as the district court determined *as a finding of fact*. While litigants are allowed to prove invidious intent with a large variety of inferential evidence,[11] the inference that the board desired to harm Hispanic interests because such harm inevitably resulted from the Board's decision cannot succeed here because the district court determined that no such intent existed.[12]

In upholding the district court's intentional discrimination ruling, the Court of Appeals relied heavily on finding 181:

> "The Supervisors appear to have acted primarily on the political instinct of self-preservation. The Court finds, however, that the Supervisors also *intended what they knew to be the likely result of their actions* and a prerequisite to self-

---

[11] The *Feeney* Court observed that:

> This is not to say that the inevitability or forseeability of consequences of a neutral rule has no bearing upon the existence of discriminatory intent. Certainly, when the adverse consequences of a law upon an identifiable group are as inevitable as the gender-based consequences [here], a strong inference that the adverse effects were desired can reasonably be drawn. But in this inquiry—made as it is under the Constitution—an inference is a working tool, not a synonym for proof. When, as here, the impact is essentially an unavoidable consequence of a legislative policy, that has in itself always been deemed to be legitimate, and when, as here, the statutory history and all of the available evidence affirmatively demonstrate the opposite, the inference simply fails to ripen into proof.

442 U.S. at 279 n. 2 (alternations added).

[12] The district court was of the understanding that the preservation of incumbencies was a "form of discrimination" if it impeded an enhancement of minority voting strength. (App. A-148). In support of this position, the district court cited *Rybicki v. State Board of Elections*, 574 F.Supp. 1082, 1109 (N.D. Ill. 1982). This citation is the ultimate illustration of the district court's misperception of the meaning of invidious intent. In *Rybicki*, the district court considered the preservation of incumbencies as one piece of circumstantial evidence supporting the Crosby plaintiffs' claim of intentional discrimination. 574 F.Supp. at 1110. The *Rybicki* court, however, relied on additional evidence that showed, through the weight of collective inferences, that the *purpose* of the redistricting was to harm the ability of blacks to elect a candidate. 574 F.Supp. at 1092. The district court here, in other words, confused the definition of intent with the means of proof.

(Footnote continued on following page)

preservation—the continued fragmentation of the Hispanic Core and the dilution of Hispanic voting strength."

If the words in this finding mean what they seem to mean—that the Board intended Hispanic vote dilution because it "knew" that would be the "likely result" of its action—this finding is clearly inadequate as a matter of law to support an intentional discrimination conclusion. It equates intent as volition with intent as a goal or desired consequence, in clear contravention of *Feeney* and *Mobile*.

The court's interpretation of finding 181 not only reads it to mean something other that what it says, but also reads it in a way that is simply inconsistent with other parts of the district court's opinion which exonerated the Board of any charge of purposeful discrimination. Thus, the district court concluded that the Board adopted the 1981 plan "not because of a desire on anyone's part to dilute or diffuse or to keep the Hispanic community powerless," and further that "had the Board found it possible to protect their incumbencies while increasing Hispanic voting strength, they would have acted to satisfy both objectives."[13]

Read fairly, these findings together with 181 simply exonerate the Board under *Feeney* and *Mobile*: They say that the Board had

---

(Footnote continued from previous page)

Unlike *Rybicki*, in which an Anglo Democrat sought to preserve his incumbency against the challenge of a black Democrat by a change in the status quo to a more Anglo district, the district court in this case found that the Board through stalemate did nothing, essentially leaving the lines from 1971 in place. The effect was not to protect an Anglo against a minority of the same party but rather against an Anglo of a different *political* philosophy. The distinction between this case and *Rybicki* is that the district court expressly found no intent to harm Hispanic interests, whereas in *Rybicki* the district court found an intent to dilute black voting strength.

[13] The courts below erred in ruling that the Board's action, though not taken out of racial prejudice, animosity or hostility, was nonetheless taken for a racially discriminatory purpose. A "discriminatory purpose" under the Equal Protection Clause is one that reflects racial prejudice, antipathy, hostility or racism. This is the concept embodied in the proposition often repeated that the clause prohibits only racially "invidious" actions, and its operational meaning is that plaintiffs must prove that the Board acted to dilute Hispanic voting strength because it thought them less worthy or deserving than others.

(Footnote continued on following page)

knowledge of the effects of the plan on Hispanic voting strength but did not act for the purpose of bringing about these effects[14].

B. The Remedy Does Not Match the Discriminatory Purpose Findings

In this case the remedy ordered by the district court and affirmed by the Court of Appeals bears only a limited relationship to the acts of intentional discrimination on the basis of which the Board was held liable,[15] in violation of this Court's longstanding constitutional remedial jurisprudence that the scope of the remedy is determined by the nature of the liability.

(Footnote continued from previous page)

Perhaps the clearest explanation of the invidiousness requirement is in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), where the court, in rejecting the argument that "mental handicappedness" was a suspect classification, explained the basis of the rule that racial classifications are suspect: "[S]uch considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others." (emphasis added) 473 U.S. at 440.

[14] Because there was no such evidence, the Court of Appeals erred in ruling that the Board's racially discriminatory purpose, if any, was the cause of its adoption of the 1981 redistricting plan. The causative purpose rule of *Arlington Heights, supra*, and *Hunter v. Underwood*, 471 U.S. 222 (1985) is not applicable in this case. *See also, Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274 (1977). That rule was developed to deal with cases in which the plaintiff succeeded in proving that one of the desired effects or goals or objectives of a governmental action was discriminatory but one or more other goals were not. In such a case the burden shifts to the governmental agency charged with discriminating to prove by a preponderance of the evidence that it would have taken the same action quite apart from the discriminatory purpose. 429 U.S. 270-271, n. 21.

The causative purpose rule is not applicable in this case because the plaintiffs have failed to prove that one of the Board's desired effects, goals or objectives in the 1981 redistricting was to fragment Hispanics or dilute their vote. They have proven only that the Board acted for a legitimate goal, preserving incumbencies, with knowledge of the racial consequences. This proof is not sufficient to invoke the causative purpose rule for the obvious reason that the Board did not act for two purposes: it acted for one entirely legitimate purpose.

[15] The Court's two major cases addressing the remedial authority of federal courts are *Swann v. Charlotte Mecklenburg Board of Education*, 402 U.S. 1 (1971) and *Milliken v. Bradley*, 418 U.S. 717 (1974), both school desegregation cases. The *Swann* Court stressed that while judges are given discretion in

(Footnote continued on following page)

The Board was found to have intentionally discriminated against Hispanics in four redistrictings: 1959; 1965; 1971; and 1981. Neither of the courts below explained how the first three redistrictings related to the Board's liability for the 1981 redistricting, which was the only one ever challenged. Presumably, the implicit theory of the courts below was that the discriminatory effects of those redistrictings were perpetuated because of the 1981 redistricting stalemate. Even assuming, however, that the 1981 redistricting did perpetuate discriminatory effects produced by these prior redistrictings, the remedy ordered by the court goes substantially beyond what would be required by the discriminatory intents of these pre-1981 redistrictings or the cumulative discriminatory effects (assumedly) produced by all three of them combined.

In finding 112 (App. A-72) the district court found that,

> the Board has redrawn the supervisorial boundaries over the period 1959-1971, at least in part, to avoid enhancing Hispanic voting strength in *District 3*, the district that historically had the highest proportion of Hispanics . . . .

Although the court found discriminatory intention in the redistricting of District 3, the court-ordered remedial plan makes District 1, not District 3, the Hispanic district. This can neither be explained nor justified by a theory that discriminatory effects of the 1959-1971 redistrictings were either perpetuated or for that matter aggravated by the 1981 redistricting. How can a District 1 remedy be a responsive cure to the acts with respect to District 3 that were the basis of liability?

(Footnote continued from previous page)

imposing equitable remedies, their powers only may be exercised on the basis of a constitutional violation and "with any equity case, the nature of the violation determines the scope of the remedy." *Swann*, 402 U.S. at 16. *Milliken* provides an example of a remedial order that violated the principles established in *Swann*. The Court noted that "controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation." *Milliken*, 418 U.S. at 744. It also noted that "the remedy is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." 418 U.S. 717, 747.

The County is not quibbling with details of the remedy: Of course district courts need some degree of discretionary flexibility in fashioning remedies in these complex cases. But this is not the problem here. The court simply created the remedial Hispanic district in a different one than was the basis of its liability finding.

Moreover, if it is pre-1981 behavior that is to be remedied in part, then one would not make District 1 the Hispanic district but District 3, which was the District affected by that behavior, not District 1. Given that the 1981 redistricting was the result of non-action rather than action, the remedial plan of the district court can be upheld only if it represents a plan that would have been adopted at some earlier time but for the purportedly improper decisions by which the Board is said to have discouraged Hispanic challengers from running in the Third District. That being so, the first aspect of the lower court's plan—placing the Hispanic seat in the First District—patently exceeds the remedial power of the court. There is not the slightest evidence that the Board would have moved Hispanics from the Third to the First District but for its improper motive. The court's plan, in fact, includes areas never proposed for addition to the most Hispanic district and excludes areas which used to be in the district but which were never proposed to be excluded. This exercise confirms the fact that the district court's remedy is considerably more than a remedy for the incumbency-protection which the district court condemned. It is a remedy which makes District 1 the Hispanic district, not because that would remedy the effects of past discrimination (incumbency protection), but for the altogether affirmative purpose, unrelated to the liability findings, of ensuring Hispanic success by devaluing the votes of 90% of the County's citizens in the other four districts.

The district court's rejection of the County's proposed remedial plan, therefore, was highly inappropriate because it in fact made District 3 the Hispanic district. Nor were four votes required to enact it as the Court of Appeals held.[17] (App. A-24)

[17] The four-vote County Charter requirement only applies to redistrictings after a decennial census and "within one year after a general election." (App. A-360)

(Footnote continued on following page)

III.

THE COURT OF APPEALS' RULING THAT BECAUSE PLAINTIFFS PROVED THAT THE BOARD ACTED WITH A DISCRIMINATORY INTENT, THEY DID NOT HAVE TO PROVE THE THORNBURG PRECONDITIONS OR RACIAL NONRESPONSIVENESS CONFLICTS WITH DECISIONS OF THIS COURT AND RAISES IMPORTANT CONSTITUTIONAL AND STATUTORY QUESTIONS OF LAW WHICH HAVE NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

The County contended below that plaintiffs' intentional discrimination claim must fail because plaintiffs were obliged to prove both discriminatory purpose and discriminatory effects which are the same as the three effects established as a threshold precondition to a successful Section 2 claim in *Thornburg*. It is undisputed that a compact district with an Hispanic voting majority could not have been created in 1981. Thus, the 1981 redistricting plan did not violate Section 2 of the Voting Rights Act under the criteria established in *Thornburg* at the time it was adopted.

The Court of Appeals, however, held that, in a case where discriminatory intent is proven, the *Thornburg* preconditions need not be established so long as the challenged districting produced some racially discriminatory effects. It further held that the 1981 redistricting challenged here did produce some discriminatory effects less than the *Thornburg* effects but nonetheless affirmed a *Thornburg* majority district remedy.

There are two problems with the Court of Appeals' ruling. First, the court erred as a matter of law in not requiring proof of the *Thornburg* effects in a case alleging intentional discrimination. If uncorrected, the Court of Appeals' decision

---

(Footnote continued from previous page)

The two-thirds supermajority requirement did not apply here because the County's proposed remedial redistricting plan was not "made within one year after a general election." Because the County Charter is silent, state law controls, which specifies three votes is sufficient. California Govt. Code, Section 25005. (App. A-359) The County's plan therefore is a valid legislative act.

will wreak havoc in future voting rights suits, because it severs the concept of "vote dilution" from *Thornburg's* brightline test without substituting any criteria at all for measuring when dilution actually has occurred and whether it has been caused by the districting scheme under challenge. Second, it renders the district court's *Thornburg* majority district remedy unsupportable. A far less drastic remedy commensurate with the discriminatory purpose findings should have been ordered.

A. The Courts Below Erred As a Matter of Law in Their Determination that Proof of Racially Discriminatory Effects of the Sort Required in a Section 2 Claim is Not Required in a Case Alleging Intentional Discrimination

The Supreme Court has made it abundantly clear that the equal protection clause requires *both* intent and effect. *Davis v. Bandemer,* 478 U.S. 109, (1986); *McClesky v. Kemp,* 481 U.S. 279, 292 (1987). Proof of the sort of effects required by *Thornburg* to maintain a constitutional claim is not reasonably open to dispute.

Prior to the amendment of Section 2 in 1982, minority vote dilution cases under the Constitution were successful only where effective voting majorities could be created.[18] Another keystone of these constitutionally based challenges was proof of racially polarized voting (which consists of two elements—minority political cohesion and white bloc voting that usually defeats the preferred candidate of minority voters). *Thornburg,* 478 U.S. at 48-51. Indeed, Section 2's so called Senate factors, which include polarized voting, derive from minority vote dilution cases under the Constitution. *See Zimmer v. McKeithen,* 485 F.2d 1297, 1305 (5th Cir. 1973), *aff'd sub nom., East Carrol Parish School v. Marshall,* 424 U.S. 636 (1976). The effective voting majority and

[18] The *Thornburg* trial court found it "doubtful" that a racial vote dilution theory could be applied "under any circumstances to smaller aggregations of voters than those sufficient to make up effective single-member district voting majorities." *Gingles v. Edmisten,* 589 F.Supp. 345, 380-81 (E.D.N.C. 1984),

(Footnote continued on following page)

polarized voting requirements, of course, are the same as the three *Thornburg* preconditions.

Still another requirement in the pre-1982 intentional discrimination cases was proof that the jurisdiction under challenge had been unresponsive to minority interests.[19] Here, plaintiffs made no claim that the County had been unresponsive to Hispanics and offered no evidence to that effect.

(Footnote continued from previous page)

aff'd in part, rev'd in part sub nom., Thornburgh v. Gingles, 478 U.S. 30 (1986) As the Court explained:

> There is, first off, the fact that the principle cases authoritatively developing the vote dilution concept have involved the impact of districting upon effective voting majorities. *See, e.g., Rogers v. Lodge,* 458 U.S. 613 . . . (1982); *Mobile v. Bolden,* 446 U.S. 55 . . . (1980); *White v. Regester,* 412 U.S. 755 . . . (1973). Confined to such measurable aggregations, the concept has a principled basis which permits rational and consistent, albeit sometimes difficult, application; not so confined, it lacks any such basis. That is to say, at the effective voting majority level it is possible to say with substantial assurance that to submerge or fracture such an aggregation in a racially polarized voting situation effectively deprives it of the presumptive capability to elect, *solely by its group voting strength,* representatives "of its choice." . . . The raw power of such an aggregation "to elect" provides a clear measure of its voting strength, hence a fair and workable standard by which to measure dilution of that strength. Short of that level, there is no such principled basis for gauging voting strength, hence dilution of that strength. Nothing but raw intuition could be drawn upon by courts to determine in the first place the size of those smaller aggregations having sufficient group voting strength to be capable of dilution in any legally meaningful sense and, beyond that, to give some substantive content other than raw-power-to-elect to the concept as applied to such aggregations.
>
> *We are doubtful that either the Supreme Court in developing the dilution concept in constitutional voting rights litigation, or the Congress in embodying it in amended Section 2 of the Voting Rights Act intended an application open-ended as to voter group size. There must obviously be some size (as well as dispersion) limits on those aggregations of voters to whom the concept can properly be applied. We do not readily perceive the limit short of the effective voting majority level that can rationally be drawn and applied.*

590 F.Supp. at 381 (emphasis added).

[19] In the pre-1982 cases, the Supreme Court recognized that the surest indication that "vote dilution" is in fact an accurate characterization of a challenged practice is the existence of nonresponsiveness by the governmental body at issue to the minority group's interests. Both *White v. Register,* 412 U.S.

(Footnote continued on following page)

The amendment of Section 2 did not change the proof required to establish a constitutional claim, nor could it. Section 2 eliminated the need to prove an invidious purpose to prevail on a Section 2 claim. It did not, however, eliminate or in any way address the already existing and continuing proof requirements of a constitutional claim, which already included the three *Thornburg* preconditions and nonresponsiveness.

No purpose would be served by having a different "effects" test to define minority vote dilution in claims under Section 2 than under the Constitution. *Thornburg* represents the culmination of an historical search for standards by which to assess claims of vote dilution. It established a set of "clear rules over muddy efforts to discern equity," that prevent courts from building "castles in the air, based on quite speculative foundations." *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 942-44 (7th Cir. 1988) *cert. denied*, U.S. , 109 S.Ct. 1769 (1989). *Thornburg's* first precondition, for example, is a concrete recognition of the amorphous nature of claims that voting strength has been "impaired" or "diluted," and of the constitutional, statutory and jurisprudential limitations which surround these claims. The brightline approach in *Thornburg* obviously was a response to the difficulties inherent in trying to assess when a voting system sufficiently disadvantages a minority group so that a court confidently can find that it has in fact been denied equal opportunity to participate in the political process. The difficult

---

(Footnote continued from previous page)
755, 767-69 (1973) and *Whitcomb v. Chavis*, 403 U.S. 124, 149-52 (1971), for example, featured prominent discussions of nonresponsiveness, and this was largely the basis on which the *Mobile v. Bolden* Court distinguished *White*, 446 U.S. 68-70, the only successful pre-1982 challenge to voting district practices by minority group members to succeed in the Supreme Court.

Nonresponsiveness is an inference that arises from a governmental body's treating minority groups less well than others in the distribution of government services, employment and the like that that body does not need to take into account the electoral behavior of that minority group. *White*, 412 U.S. at 767. Nonresponsiveness is uniquely probative evidence that the allocation of racial populations among districts is not operating to protect their interests and that nonelectoral avenues for the exercise of political influence are also not functioning fairly. In sum, such evidence establishes that a plausible vote dilution claim really is such.

effects assessment problems that underlie *Thornburg* are just as real and troublesome in constitutional cases as in Section 2 cases.

The courts below erred as a matter of law by failing to require proof of discriminatory effects of the sort required by *Thornburg*. Consequently, failure to prove a Section 2 violation in 1981 also requires reversal of the district court's determination that the plaintiffs established their intent claims.

B. The Courts Below Imposed a *Thornburg* Remedy on the Basis of Non-*Thornburg* Liability, and Consequently the Remedy Bears Virtually No Relationship to and Vastly Exceeds that Which It Should Have Been Designed to Rectify

To warrant the granting of a *Thornburg*-based majority district remedy, plaintiffs should have to prove the *Thornburg* conditions. The district court's remedial plan was premised on findings that the plaintiffs had proven the *Thornburg* effects in addition to discriminatory intent, but the Court of Appeals affirmed on the basis of the latter finding only, holding that proof of the *Thornburg* preconditions was unnecessary when discriminatory purpose was proven. The Court of Appeals nonetheless affirmed the *Thornburg* majority district remedy and in so doing it committed clear reversible error.

Under *Swann* and *Milliken, supra,* p. 19, fn. 15, the remedy should have been tailored to those effects actually caused by the pre-1981 and 1981 discriminatory redistrictings, which would have entailed a District 3 remedy with less than a majority Hispanic voting age citizen district. Instead, plaintiffs were provided a *Thornburg* remedy without having to prove *Thornburg* liability, a remedy far beyond the effects proven, and far beyond the scope of the liability determination. Without proof of the *Thornburg* preconditions, the remedy ordered here clearly places the plaintiffs in a better position than they would have occupied had the Board not engaged in the intentionally discriminatory acts on the basis of which it has been held liable.

IV.

THE DECENNIAL REDISTRICTING RULE BARS PLAINTIFFS' SECTION 2 CLAIM

It is undisputed that Hispanics could not comprise a majority of the voting age citizens in any potential district in 1980. The district court, however, found that such a district could be formed in 1985 or at least by 1988 and therefore concluded that a Section 2 violation occurred. The County contended that the decennial redistricting rule of *Reynolds v. Sims* would foreclose any Section 2 claim if the County's 1981 redistricting plan was valid when it was adopted, *i.e.*, was not the result of discriminatory purpose.[21]

The Court of Appeals miscomprehended the County's argument. The Court of Appeals properly held the decennial redistricting rule was inapplicable in a case where a finding of intentional discrimination purpose is made and the County does not contend otherwise. The Court of Appeals, however, never addressed whether the rule would foreclose the Section 2 claim if the intentional discrimination determination is reversed. The district court determined that single member district systems, which already are subject to decennial revision under federal, state and local law, nevertheless may be subjected to more frequent reapportionment if postcensal demographic evidence indicates that a minority group which could not form a district majority at the time a decennial plan was adopted becomes sufficient in size and concentration to form a majority of the

[21] The Court of Appeals' decision is utterly unclear on whether the post-1980 evidence could be used to form a majority Hispanic district to prove a Section 2 violation. If the decision is to be read as upholding the district court's finding of a majority district for purposes of proving a Section 2 violation sometime after 1981, then the panel completely failed to address the second and third *Thornburg* preconditions which must be established to prove a Section 2 violation. These preconditions are that minority voters vote in a politically cohesive fashion and that white bloc voting usually defeats the preferred candidate of minority voters, the two *Thornburg* preconditions known collectively as "polarized voting." The County challenged in its appeal the standards utilized by the district court in assessing polarized voting, but the panel opinion overlooked that ground of appeal entirely. How can a Section 2 violation be upheld without considering that claim? The County also challenged on appeal the legal standards applied in assessing the reliability of the post-1980 evidence.

eligible voters in a single member district prior to the next reapportionment.

The Board cannot be required to reapportion its districts more frequently than decennially if a plan which it adopts complies with federal law at the time of adoption, which the 1981 plan did. The decennial limit derives from the Supreme Court's decision in *Reynolds v. Sims*, 377 U.S. 533 (1964). *Reynolds* held that the Equal Protection Clause of the Fourteenth Amendment protects the right of a citizen to equal representation and to have his vote weighted equally with those of all other citizens. 377 U.S. at 576.

Even though the *Reynolds* Court viewed the right to an equally weighted vote as fundamental and deserving of the utmost protection, the Court also recognized that countervailing concerns justify rational limits on the scope of that right. More specifically, the *Reynolds* Court held that political jurisdictions are entitled to:

> [A]dopt some reasonable plan for periodic revision of their apportionment schemes. Decennial reapportionment appears to be a rational approach to readjustment of legislative representation in order to take into account population shifts and growth. Reallocation of legislative seats every 10 years coincides with the prescribed practice in 41 of the States. . . . Limitations on the frequency of reapportionment are justified by *the need for stability and continuity in the organization of the legislative system*, although undoubtedly reapportioning no more frequently than every 10 years leads to some imbalance in the population of districts toward the end of the decennial period. . . . In substance, we do not regard the Equal Protection Clause *as requiring daily, monthly, annual or biennial reapportionment*, so long as a State has a reasonably conceived plan for periodic readjustment of legislative representation. While we do not intend to indicate that decennial reapportionment is a constitutional requisite, *compliance with such an approach would clearly meet the minimal requirements for maintaining a reasonably current scheme of legislative representation.*

Id. at 583-84 (emphasis added).

This rule of decennial redistricting, first announced in 1964, was reaffirmed by the Supreme Court in *Bacon v. Carlin,* 575 F.Supp. 763, 766 (D.C. Kan. 1983) (three judge court), *aff'd,* 466 U.S. 966 (1984). Thus, in 1964 and again in 1984, the Court recognized that limitations "on the frequency of reapportionment are justified by the need for stability and continuity in the organization of the legislative system." *Reynolds,* 377 U.S. at 583; *Bacon,* 575 F.Supp. at 765 (quoting *Reynolds*).

The appropriateness of the decennial limitation is underscored by the circumstances of this case. This case was not filed until the fall of 1988. Four election cycles already had been completed under the 1981 plan. By the time of the district court's ruling, only completion of one runoff election in one district remained before the Board was required to draw a new redistricting plan for the 1990s based on new data from the 1990 census, which was being taken while this case was in trial. The district court's decision was released one day prior to the June 5, 1990 primary election for Supervisorial Districts 1 and 3. The courts below should have dismissed this case on grounds of laches as well as the decennial redistricting rule. Indeed, the recent Fourth Circuit opinion in *White v. Daniel,* 909 F.2nd 99, 104 (1990), moreover, applies laches and the decennial redistricting rule to Section 2 voting rights claims on facts very similar to these.

No principled basis exists to say decennial redistricting is sufficient for one-person, one-vote dilution purposes but a different rule should exist for minority vote dilution purposes. The right to vote is a "fundamental interest" for equal protection purposes, triggering "strict scrutiny" review of inequalities in voting power. *See, e.g., Harper v. Virginia Board of Elections,* 383 U.S. 663, (1966). Race is a "suspect class," also triggering "strict scrutiny" review. *See, e.g., Loving v. Virginia,* 388 U.S. 1, 11 (1967). These are substantively indistinguishable, coequal rights. *See, e.g., Clark v. Jeter,* 486 U.S. 456 (1988). After all, minority vote dilution cases started in the redistricting arena and plaintiffs are unable to cite a single case where a redistricting plan, which was valid when adopted, later became invalid due to a change in the size and concentration of the minority population.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN E. MCDERMOTT
660 S. Figueroa Street, Suite 2300
Los Angeles, CA 90017
Telephone: (213) 955-4600

Counsel of Record for Petitioners

JOHN E. MCDERMOTT
RICHARD C. FIELD
EVAN M. EISLAND
Cadwalader Wickersham & Taft
660 S. Figueroa Street, Suite 2300
Los Angeles, CA 90017
Telephone: (213) 955-4600

GLEN D. NAGER
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005-2088
Telephone: (202) 879-3939

DE WITT W. CLINTON
COUNTY COUNSEL OF
LOS ANGELES
MARY WAWRO
SENIOR ASSISTANT
COUNTY COUNSEL
648 Hall of Administration
500 W. Temple Street
Los Angeles, CA 90012
Telephone: (213) 974-1811

RICHARD K. SIMON
LEE L. BLACKMAN
ERICH R. LUSCHEI
McDERMOTT, WILL & EMERY
2029 Century Park East,
Suite 3800
Los Angeles, CA 90067-2917
Telephone: (213) 277-4110

Counsel for Petitioners
COUNTY OF LOS ANGELES, *et al.*